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The Minnesota Antitrust Law

Mr. French details the distressing condition of the Minnesota antitrust law. He considers the statute's history, its erratic construction by the Minnesota Court, and its relationship to federal law. He also explores the practical difficulties facing both the practitioner and businessman under the existing law. The author concludes with several suggestions for making the Minnesota statute a more effective and predictable instrument for regulating anti-competitive behavior.

John D. French*

I.

The temptation exists to regard the Minnesota antitrust law¹ as Macbeth regarded life — “a tale told by an idiot, full of sound and fury signifying nothing.”²

“Sound and fury” abound in its provisions. The statute commands that:

No person or association of persons shall enter into any pool, trust agreement, combination, or understanding whatsoever . . . in restraint of trade, within this state, or between the people of this or any other state or country, or which tends in any way or degree to limit, fix, control, maintain, or regulate the price of any article of trade, manufacture, or use, bought and sold within the state, or which limits or tends to limit the production of any such article, or which prevents or limits competition in the purchase and sale thereof, or which tends or is designed so to do . . .³

Every person violating or assisting in the violation of these prohibitions is guilty of a felony; and punishable, upon conviction, “by a fine of not less than \$500, nor more than \$5,000, or by imprisonment . . . for not less than three, nor more than five,

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1. The term “Minnesota antitrust law” refers to MINN. STAT. ANN. § 325.81 (Supp. 1964) [formerly MINN. STAT. §§ 623.01–07 (1961)] which is aimed at prohibiting combinations in restraint of trade. Related regulatory statutes—e.g. the Minnesota Fair Trade Act, MINN. STAT. §§ 325.08–14 (1961), the “nonsigner” clause of which has been held unconstitutional, *Remington Arms Co. v. G.E.M. of St. Louis, Inc.*, 257 Minn. 562, 102 N.W.2d 528 (1960), and the Minnesota price discrimination law, MINN. STAT. §§ 325.03–07 (1961)—are considered only tangentially here.

2. SHAKESPEARE, *MACBETH*, 461 (Act V, Scene V) (Hardin Craig ed. 1961).

3. MINN. STAT. ANN. § 325.81, subd. 1 (1964).

years.”⁴ Further, every domestic corporation that violates or assists in a violation of the statute “shall” forfeit its corporate franchises, and guilty foreign corporations “shall” thereafter be prohibited from doing business in the state.⁵ At first glance, these appear to be sanctions well calculated to keep the business community on the straight and narrow.

As a practical matter, however, if the statute has signified something more than “nothing,” it has signified very little. Enforcement activity has been virtually nil for many years.⁶ Moreover, any state administration interested in reviving enforcement activity might have a difficult obstacle to surmount in the decision in *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*⁷ This was an action for rent allegedly due under a lease of bowling equipment. In defense, it was urged violations of the Sherman and Clayton Acts made the lease unenforceable. The court felt this raised the question whether the Minnesota courts had jurisdiction to entertain a defense predicated on the federal antitrust laws. The court appears to have held that issues arising under the federal antitrust laws, whether raised in attack or defense, are exclusively within the jurisdiction of federal courts and forbidden to state courts.⁸ In the following language the court may also have held that the Minnesota antitrust law applies only to intrastate commerce:

It is plaintiff's position that *General Talking Pictures Corp. v. De Marce*, 203 Minn. 28, 279 N.W. 750, makes it clear that the Minnesota

4. *Ibid.*

5. *Id.* at subd. 2. Subdivisions 3 through 6 provide for the reinstatement of certain foreign manufacturing corporations upon compliance with affidavit and fine requirements.

6. Professor Rahl recently listed Minnesota among the “moribund” states whose laws have become “comatose.” Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV. 753, 754 (1961). He goes on to state:

There are no reported cases of state enforcement in the annotations in Illinois since 1905, in Minnesota since 1914, in South Dakota since 1915, in Ohio since 1922, in Kansas since 1923, in Indiana since 1926, in Nebraska since 1929, or in Michigan since 1933. There is no report of any state case in Iowa, or North Dakota. Of the thirty-five states reporting in the survey conducted by the New York State Bar Association Committee in 1956, only five reported any state case since before World War II.

The state's Attorney General acknowledged in 1962 that its antitrust legislation had not been used for fifty years. *Minnesota Daily*, Feb. 27, 1962, p. 3, col. 1 (address by Attorney General Walter F. Mondale, Feb. 23, 1962).

7. 260 Minn. 499, 110 N.W.2d 348, 46 MINN. L. REV. 1135 (1962).

8. *Id.* at 508, 110 N.W.2d at 353-54.

antitrust law does not apply to interstate commerce [U]nder the record here *General Talking Pictures v. De Marce*, *supra*, is controlling.⁹

Given the comprehensive scope of the concept of interstate commerce for antitrust purposes,¹⁰ this possible construction would emasculate the state statute.

However, *Pinspotters* is arguably far from the last word on the subject. There is good reason to think the case has not deprived the statute of its potential significance. Despite the subsequent reference to the scope of the Minnesota antitrust law, it may well be that the jurisdictional question was the only one decided, for the question as posed by the court went only to the jurisdiction of a state court to entertain federal antitrust defenses.¹¹ Certainly that is the import of the court's reliance on *General Talking Pictures Corp. v. De Marce*¹² as authority for its holding. That case decided only that state courts are precluded from determining federal antitrust questions. It said nothing about the applicability of Minnesota antitrust law to interstate commerce. If *General Talking Pictures* was "controlling," only the jurisdictional question was decided.¹³ This conclusion is buttressed by reference to the court's syllabus which mentioned only the jurisdictional issue. It seems clear from available federal decisions that state courts have the power to hear federal antitrust defenses in actions brought under state law,¹⁴ and so even the jurisdictional determination was probably incorrect.

If *Pinspotters* did conclude state antitrust law is not applicable to interstate commerce, such a result would appear to be erroneous. In 1950, the Massachusetts Supreme Court said, "We have seen no case holding that Federal legislation has, in general, dis-

9. *Ibid.*

10. See, e.g., *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949):

The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

11. 260 Minn. at 508, 110 N.W.2d at 353-54.

12. 203 Minn. 28, 279 N.W. 750 (1938).

13. A student comment on *Pinspotters* takes the position that only the jurisdictional question was treated by the court and that the defendant's related argument based on the Minnesota antitrust law simply remained unanswered. 46 MINN. L. REV. 1135 n.1 (1962).

14. See Note, 46 MINN. L. REV. 1135 (1962).

placed State antitrust laws."¹⁵ Recently the Wisconsin Supreme Court roundly rejected the federal preemption argument, reasoning *inter alia* that the federal laws do not expressly preempt the field; that there is no inherent conflict of policy; and that the states may validly exercise their police power in this area for the protection of their citizens.¹⁶ These arguments seem sound, and their stature is enhanced by the concurrence of the Justice Department which has not regarded federal law as preempting the antitrust field.¹⁷

One other important consideration leads to the conclusion that the Minnesota antitrust law was not buried by *Pinspotters*. It is said the prerequisite to a quiet funeral is a willing corpse. This particular "corpse" is unwilling since a private right of action¹⁸ may be exercised without regard for the state's enforcement policy. *Miller v. Minneapolis Underwriters Ass'n*,¹⁹ serves as an illustration. A private plaintiff brought an action to force a forfeiture of the corporate franchise of the Minneapolis Underwriters Association on the ground of unreasonable restraint of competition in the insurance business in violation of the Minnesota antitrust law. Judgment was for the defendants, and plaintiff appealed.

The Minnesota Supreme Court affirmed, but only because plaintiff had pursued the wrong remedy by failing to proceed by writ of quo warranto.²⁰ On the question of whether a private plaintiff was qualified to begin and conduct charter forfeiture proceedings, the court clearly answered in the affirmative.²¹ The court recognized that while indictment and conviction for violation of the antitrust statute may be made the basis for a charter forfeiture proceeding, they are not indispensable.²²

15. *Commonwealth v. McHugh*, 326 Mass. 249, 266, 93 N.E.2d 751, 762 (1950).

16. *State v. Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 101 N.W.2d 133 (1960). See *State v. Southeast Tex. Chapter of Nat'l Elec. Contractors Ass'n*, 358 S.W.2d 711 (Tex. Civ. App. 1962), *cert. denied*, 372 U.S. 969 (1963); Rahl, *supra* note 6, at 756-58.

17. See Hearing of Subcommittee No. 3, House Judiciary Committee, March 1, 1962, p. 20; Note, 38 N.Y.U.L. Rev. 575, 578 (1963). Of course, this does not mean that in a particular case a peculiar provision of state antitrust law might not be held invalid because of conflict with federal antitrust policy.

18. MINN. STAT. ANN. § 325.81, subd. 2 (Supp. 1964).

19. 226 Minn. 367, 33 N.W.2d 48 (1948).

20. The writ of quo warranto has been supplanted in Minnesota by other procedures. See *Town of Burnsville v. City of Bloomington*, 264 Minn. 133, 117 N.W.2d 746 (1965).

21. 226 Minn. at 374, 33 N.W.2d at 53.

22.

An action for cancellation of a corporate charter is, however, so distinctly a civil proceeding that, in the absence of a statutory require-

It appears, therefore, that the statute is of sufficient practical significance to merit further study. Any businessman contemplating action which may violate the Minnesota antitrust law must act with regard for the statute or gamble (1) that *Pinspotters* actually holds the statute applicable only to intrastate commerce, a questionable supposition at best,²³ and (2) that his case will be held, on its facts, to involve interstate commerce. If he is wrong on either count and wrong on the merits as well, he faces the loss of his corporate character at the behest of a private party injured by his conduct, even if the state chooses not to act.²⁴

II.

Minnesota antitrust legislation dates from the latter part of the nineteenth century,²⁵ when a wave of public sentiment produced many state antitrust statutes and the Federal Sherman Act as well.²⁶ Three quarters of a century of obscure precedents would shed little light on the meaning of the Minnesota statute were it not for a single case, *State v. Duluth Board of Trade*.²⁷ This is not without irony since *Duluth Board of Trade* seems clearly to have erred in both branches of its alternative holdings.

The case was a proceeding for forfeiture of the corporate franchise of the Duluth Board of Trade, a grain exchange, and for an injunction against the transaction of business under its rules. The state directed its fire principally at Board Rule 26 which set forth the commission rates deemed just and reasonable

ment to the contrary, a criminal conviction for the violation of the antitrust statute is neither a condition precedent to the commencement of the action nor to a judgment of forfeiture. In establishing a basis for charter forfeiture, a violation of the antitrust statute, § 623.01, may be determined independently of any criminal prosecution or conviction. . . . The primary purpose of the proceeding is to establish an abuse of the corporate franchise privilege, irrespective of whether a crime has been committed, as a basis for adjudging that such abuse constitutes a forfeiture of the charter. . . .

226 Minn. at 373-74, 33 N.W.2d at 52-53.

23. See text accompanying notes 10-17 *supra*. Mosk, *State Antitrust Enforcement and Coordination With Federal Enforcement*, 21 A.B.A. Antitrust Section Rep. 358, 364-68 (1962).

24. Presumably a foreign corporation is equally in jeopardy of loss of its right to transact business in the state at the instance of a private party, since the section of the statute authorizing this private right of action is the same as that which authorizes the private right of action for charter forfeiture approved in the *Miller* case.

25. See *State v. Duluth Board of Trade*, 107 Minn. 506, 515-17, 121 N.W. 395, 398-99 (1909).

26. See Wilson, *The State Antitrust Laws*, 47 A.B.A.J. 160 (1961); Note, 32 COLUM. L. REV. 347 (1932).

27. 107 Minn. 506, 121 N.W. 395 (1909).

and fixed a fine for charging less than the established fees.²⁸ Judgment below was for the defendants, and the Minnesota Supreme Court affirmed, resting its decision on two grounds. First, relying on decisions involving labor unions, the court said, "The right of laboring men to combine for the purpose of regulating their wages can no longer be seriously denied."²⁹ From this the court reasoned a "rule of law applicable to men who work with their hands should . . . be equally applicable . . . to men whose work is more intellectual."³⁰ The court also found labor was not an "article" or "commodity" within the meaning of the statute,³¹ and thus concluded that combinations "to fix the charges that shall be made for personal services, are not within the prohibitions of the statute."³² In the alternative the court found Rule 26 did not violate the statute because it did not make a monopoly, restrain trade, or control the price or production of any item of trade. The court believed that so long as the commission rate was reasonable, it was as beneficial to require that it be uniform as to require uniformity in railroad freight rates.³³ While in a remote and indirect way the rule might affect price, "contracts and agreements for certain uniform charges, which are for the benefit of all and operate only indirectly on production and prices, are not within the prohibitions of the statute."³⁴

If this were all there was to *Duluth Board of Trade*, it would stand for very little. Its first point — that the statute does not apply to personal services — was all but overruled in *Campbell v. Motion Picture Mach. Operators' Union*.³⁵ Further, the view that a fixed, uniform commission charge is permissible if the rate is reasonable is completely at odds with the generally accepted modern rule that a combination to fix prices is illegal per se.³⁶

28. *Id.* at 515, 121 N.W. at 397-98.

29. *Id.* at 546, 121 N.W. at 411.

30. *Ibid.*

31. *Id.* at 546-47, 121 N.W. at 412.

32. *Id.* at 550, 121 N.W. at 413.

33. *Ibid.*

34. *Id.* at 551, 121 N.W. at 414.

35. 151 Minn. 220, 186 N.W. 781 (1922). The court held the statute applicable to labor union activities and declared that any contrary implications of *Duluth Board of Trade* "were not intended as a decision of the point" and "must, therefore, be limited to the facts there before the court." *Id.* at 230, 186 N.W. at 784. The court found the expression "trade" to include labor. *Id.* at 231, 186 N.W. at 784.

36. See, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Perhaps the closest support for *Duluth Board of Trade* available in currently

But *Duluth Board of Trade* reaches beyond its immediate facts. No other Minnesota opinion so thoroughly canvasses the history of the law on restraints of trade. In the course of this survey, the court points out that:

The Minnesota anti-trust law is framed along the lines of the federal statute, although it is more diffuse. It may fairly be assumed, however, that the general purpose of all statutes of this kind is the same, and we may therefore properly look to the decisions made under federal and state statutes of a similar character for the principle by which to construe our own statute³⁷

This principle of harmonious construction has become firmly fixed in Minnesota law. Paradoxically, it provided the rationale in *Campbell v. Motion Picture Mach. Operators' Union*³⁸ for discarding the *Duluth Board of Trade* conclusion that the statute is inapplicable to personal services.³⁹ In *Campbell* the court said that if the Minnesota act is to be construed in conformity with constructions of the Sherman Act, it must apply "to combinations of employers as well as to combinations of employees."⁴⁰

authoritative precedent is *Board of Trade v. United States*, 246 U.S. 231 (1918), which upheld a rule prohibiting Board members from purchasing between the close of one session and the commencement of the next at other than the closing bid. However, the object here was not to fix the price but only "the period of price-making," and any analogy between this practice and the one considered in *Duluth Board of Trade* seems inapposite. See the manner in which *Board of Trade* is distinguished in *United States v. Socony-Vacuum Oil Co.*, *supra*.

37. 107 Minn. at 517, 121 N.W. at 399. A similar conclusion had been reached by a federal court in *Minnesota v. Northern Securities Co.*, 123 Fed. 692 (C.C.D. Minn. 1903), *rev'd*, 194 U.S. 48 (1904), which was cited in *Duluth Board of Trade*.

38. 151 Minn. 220, 228-29, 186 N.W. 781, 783 (1922). The court said:

The Sherman Act went into effect July 2, 1890; the original of our own anti-trust act, on April 20, 1891. Its genesis was outlined in *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N.W. 395, 23 L.R.A. (N.S.) 1260, where it was said that the statute was framed along the lines of the Sherman Act; that the general purpose of all such statutes is the same, and that this court may properly look to decisions made under Federal and state statutes of a similar character for the principle by which to construe our statute.

39. See note 35 *supra* and accompanying text.

40. 151 Minn. at 230, 186 N.W. at 784. More recently the court has said: Where the state government, acting independently in its own sphere, copies a federal statute, the state act will be construed to have the same meaning as the federal act. *Pittsburgh Plate Glass Co. v. Paine & Nixon Co.*, 182 Minn. 159, 234 N.W. 453. In *Campbell v. Motion Picture Mach. Operators' Union*, 151 Minn. 220, 229, 186 N.W. 781, 27 A.L.R. 631, the question was whether the state antitrust law should be

Campbell indicates the court's intention to adhere to this rule of conformity with Sherman Act decisions even to the extent of overruling prior Minnesota precedents.⁴¹

In sum, we are left to find the meaning of the state law in federal cases. However, two important caveats must be noted. First, it is unlikely that any but Sherman Act precedents are authoritative. It is that statute from which the state law was derived, and it is to that statute the court has referred in invoking the doctrine of uniform construction. Other federal antitrust statutes were subsequently drafted to accomplish results not thought to be attainable under the Sherman Act.⁴² Given the doctrine of uniform construction, those results should be equally unattainable under the state act in the absence of similar supplementary legislation.⁴³ Second, not all Sherman Act law is in point. That statute prohibits not only contracts, combinations, and conspiracies in restraint of trade,⁴⁴ but individual monopolization and attempts

construed the same as the Sherman federal antitrust act, from which it was copied. There were persuasive arguments against the construction of the Sherman Act adopted by the federal courts. We held that the state statute was intended to have the same meaning as the federal act and followed the federal rule, pointing out that it would be anomalous to have the state and federal courts applying different rules to the same facts under identical provisions of law. . . .

Christgau v. Woodlawn Cemetery Ass'n, 208 Minn. 263, 276, 293 N.W. 619, 625 (1940).

41. See 151 Minn. at 229-30, 186 N.W. at 784.

42. For example, the Supreme Court states in *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 n.32 (1962):

That § 7 of the Clayton Act was intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act was explicitly stated in the Senate Report on the original Act. S. Rep. No. 698, 63d Cong. 2d Sess. 1.

43. Several supplementary state laws have been enacted. See note 1 *supra*. *United States v. Columbia Steel Co.*, 334 U.S. 495, 507 n.7 (1948) permits consideration of Clayton Act policy in a Sherman Act case, but it recognizes the distinctions between these statutes. See *id.* at 522 n.19. The differences are also acknowledged in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609-10 (1953), in which the Court said:

While the Clayton Act's more specific standards illuminate the public policy which the Sherman Act was designed to subserve . . . the Government here must measure up to the criteria of the more stringent law.

As Justice Harlan stated in dissent in *United States v. First National Bank & Trust Co.*, 376 U.S. 665, 679 n.10 (1964):

It is one thing to say . . . that "the Clayton Act's more specific standards illuminate the public policy which the Sherman Act was designed to subserve. . . ." It is quite another thing to treat them as interchangeable.

44. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

to monopolize as well.⁴⁵ The state act, on the other hand, forbids only collective action, *i.e.*, "any pool, trust agreement, combination, or understanding," with another in restraint of trade.⁴⁶ While section 1 of the Sherman Act dealing with contracts, combinations, and conspiracies, was copied,⁴⁷ section 2 on monopolies was ignored. Thus, there is a strong inference that individual attempts to monopolize are not covered. This inference is strengthened by the fact that other statutes have prohibited individual attempts to monopolize, indicating that the concept is not unfamiliar to the state legislature.⁴⁸

This does not mean that restraints assailable under the federal Clayton Act,⁴⁹ for example, are entirely immune from state prosecution because the state has failed to enact a copy of that statute. It does mean that such restraints must attain the level of Sherman Act violations before they violate the state law. To be successfully prosecuted at the state level, they must amount to combinations whose actual purpose or effect is restraint of trade of the sort prescribed by the Sherman Act, rather than combinations that merely portend of a future restraint of trade in violation of the less stringent incipency standards of the Clayton Act. Corporate mergers provide a prime example of a type of business activity to which this important distinction is applicable. Under section 7 of the Clayton Act, a merger may be prevented if its effect "may be substantially to lessen competition,"⁵⁰ *i.e.*, if, "at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints."⁵¹ The state statute, derived from the Sherman Act and lacking provisions aimed at such incipient restraints, cannot be invoked unless the merger is of such magnitude as to bring about an immediate

45. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1964).

46. MINN. STAT. ANN. § 325.81 (Supp. 1964).

47. Only section 1 is mentioned in *State v. Duluth Board of Trade*, 107 Minn. 506, 517, 121 N.W. 395, 399 (1909).

48. For example, MINN. STAT. ANN. § 325.82 (Supp. 1964) forbids any person to discriminate in the price of petroleum products for the purpose of creating a monopoly. Similarly, under MINN. STAT. § 235.10 (1961) it is unlawful to discriminate in price in the purchase of grain with the intention of creating a monopoly.

It is not unique for a state law to prohibit only collective action. For example, this is true of the Wisconsin statute. See Comments, 1951 WIS. L. REV. 657.

49. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1964).

50. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

51. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957).

restraint of trade upon consummation. Thus, of the many federal merger cases, only those bottomed on the Sherman Act provide authority for decisions under the state law.⁵²

Given the Sherman Act precedents, and the rule that the state act is to be construed to harmonize with section 1 of the Sherman Act, one may sketch the broad outlines of present Minnesota anti-trust law.⁵³ First, not every restraint of trade is unlawful;⁵⁴ only those that unduly restrict competition. On the other hand, this "rule of reason" does not permit the defendant to attempt to excuse business activity which is inherently anticompetitive. There are:

. . . certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; division of markets, *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, aff'd 175 U.S. 211; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392.⁵⁵

Unless a practice falls into this category of *per se* offenses, its lawfulness or unlawfulness depends on an analysis of its purposes and economic effects under the prevailing circumstances. The

52. For the most recent Sherman Act merger case, see *United States v. First National Bank & Trust Co.*, 376 U.S. 665 (1964). A six-party consolidation was held illegal under state law in *State v. Creamery Package Mfg. Co.*, 110 Minn. 415, 126 N.W. 623 (1910), but the exact significance of this decision is unclear due to its emphasis on the sham nature of the transaction as merely a "nominal purchase."

United States v. Columbia Steel Co., 334 U.S. 495, 507 n.7 (1948), does not detract from the conclusions drawn above. See notes 42 & 43 *supra*.

53. The word "sketch" is used advisedly, for the subject is far too vast to permit more than passing mention of its highlights here. The practitioner faced with a specific Minnesota antitrust problem should consult the precedents under section 1 of the Sherman Act in detail.

54. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

55. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

relevant lines of inquiry in distinguishing per se offenses from conduct that may be lawful under the rule of reason are indicated by the United States Supreme Court's recent decision in *White Motor Co. v. United States*.⁵⁶ The complaint alleged, and the defendant admitted, among other things, that each distributor of trucks manufactured by defendant was given an exclusive sales territory and required not to sell outside that territory; and that no such distributor was permitted to sell defendant's trucks to any governmental agency without the manufacturer's written consent. The district court considered these per se violations of the Sherman Act and granted the Government summary judgment.⁵⁷ On direct appeal, the Supreme Court reversed and remanded for trial.

Three dissenting justices agreed with the court below. They thought the defendant's argument boiled down to an assertion that the foregoing restraints were required to permit defendant to compete with larger and more powerful competitors. In rejecting the possibility of demonstrating that the restraints were reasonable because of business necessity, the dissent said the "rule of reason" is inapplicable to agreements made solely for the purpose of eliminating competition (here, between defendant's distributors). For this reason, the dissenting justices thought remand of the case for trial was futile, since it would not be possible for the defendant corporation to adduce facts upon which a successful defense could be predicated.

The majority, on the other hand, believed that no decision was possible in the absence of evidence showing the effects of the challenged practices. It was recognized that there is no need for a trial to show the nature and extent of such per se unlawful practices as the tie-in sale of an unpatented product with a patented article, the division of markets by competitors, group boycotts, or price-fixing arrangements. The majority pointed out, however, that this was the first case on vertically imposed territorial restrictions, and it reiterated the thinking of *Board of Trade v. United States*⁵⁸ that courts must ordinarily consider the facts peculiar to the business before they can decide whether a restraint promotes or suppresses competition. The question was whether defendant's conduct was so pernicious in its effect on competition as to lack any redeeming virtue. The court concluded that it did

56. 372 U.S. 253 (1963).

57. 194 F. Supp. 562 (N.D. Ohio 1961).

58. 246 U.S. 231 (1918).

"not know enough of the economic and business stuff out of which these arrangements emerge to be certain."⁵⁹

It is worth noting that the "rule of reason" has long played a part in state restraint of trade cases.⁶⁰ Of particular importance is the role the rule has had, either explicitly or implicitly, in the numerous decisions involving restraints that are merely ancillary to some legitimate business transaction, such as the sale of a business or the formation of an employment relationship. For example, one person may agree to buy the business of another, but only on condition that the seller refrain from resuming the same sort of business in the same city for a specified period of time. Or one person may agree to employ another, but only on condition that the employee not enter into competition with the employer for a specified period of time following the termination of his employment. The lawfulness of these arrangements in Minnesota has always been tested by reference to questions bearing on their reasonableness: *e.g.*, whether the covenantee had a legitimate interest to protect; whether the restraint was suitable to the protection of that interest; and whether the covenantor was unduly limited in earning a livelihood.⁶¹ In this respect, the Minnesota approach is in accord with the prevailing approach in other jurisdictions⁶² and appears to harmonize with Sherman Act decisions as well.⁶³

Even if conduct is found to impose a serious restraint on trade, it will not be unlawful under the state act unless it is the product of a collective action.⁶⁴ Here the Sherman Act precedents on

59. 372 U.S. at 263. Mr. Justice Brennan joined the opinion of the Court but also wrote a separate concurrence which implies that a "rule of reason" approach may be applicable to territorial restrictions on distributors but not to customer restrictions.

60. See, *e.g.*, *Pittsburgh Plate Glass Co. v. Paine & Nixon Co.*, 182 Minn. 159, 234 N.W. 453 (1930); *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N.W. 395 (1909).

61. See, *e.g.*, *Peoples Cleaning & Dyeing Co. v. Share*, 168 Minn. 474, 210 N.W. 397 (1926); *Granger v. Craven*, 159 Minn. 296, 199 N.W. 10 (1924); *The Menter Co. v. Brock*, 147 Minn. 407, 180 N.W. 553 (1920); *Holliston v. Ernston*, 124 Minn. 49, 144 N.W. 415 (1913); *Espenson v. Koepke*, 93 Minn. 278, 101 N.W. 168 (1904).

62. See *Blake, Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960); Annot., 46 A.L.R.2d 119 (1956); Annot., 45 A.L.R.2d 77 (1956); Annot., 43 A.L.R.2d 94 (1955); Annot., 41 A.L.R.2d 15 (1955).

63. See *United States v. E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956); *Foundry Services, Inc. v. Beneflux Corp.*, 110 F. Supp. 857 (S.D.N.Y.), *rev'd on other grounds*, 206 F.2d 214 (2d Cir. 1953); *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *mod. and aff'd*, 175 U.S. 211 (1899).

64. See text accompanying notes 44-48 *supra*.

what constitutes a contract, combination, or conspiracy provide a guide for decision. It is obvious that collective action requires the participation of two or more persons, but it is not always obvious when this has been the case. The most difficult questions arise in a corporate setting. Under the leading decisions, the fact of common ownership or control does not insulate corporate defendants from antitrust liability. For example, wholly owned subsidiaries of the same parent can be held to have conspired.⁶⁵ On the other hand, it is recognized that a corporation can act only through its agents. Thus, a complaint which alleges only that a corporation has acted in combination with its own officers or agents in their normal capacities as such fails to state a cause of action based on conspiracy.⁶⁶ However, once it is shown that a combination has been formed with the purpose or effect of unreasonably restraining trade, a violation of the law is established. That is, the combination itself violates the statute, and no overt act in furtherance of its purpose need be proved.⁶⁷

Because direct evidence of an antitrust conspiracy customarily is not easy to obtain, proving the conspiracy is often more difficult for the enforcing authority than proving that trade has been unduly restrained. Courts have recognized this problem and have accepted evidence of the conduct of the defendants as evidence of concerted action. It is therefore possible to infer conspiracy, for example, when many members of a retail trade association cease to do business with wholesalers upon report from the association that the wholesalers have sold directly to consumers.⁶⁸ As the Supreme Court has said, "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."⁶⁹ On the other hand, parallel business behavior does not conclusively establish agreement and

65. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); see *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

66. *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); see ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 31 (1955).

67. See, *e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). MINN. STAT. ANN. § 325.81 (Supp. 1964) prohibits not only those combinations which restrain trade but those which "tend" or are "designed" to limit competition. That is, simply forming a combination with the "design" of preventing competition violates the act.

68. *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914).

69. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

is not an offense in itself. Standing alone the fact that none of a group of major motion picture distributors would sell first-run pictures to a particular theater — there being evidence of individual business reasons for their refusal — did not dictate a finding of conspiracy.⁷⁰

The *Report of the Attorney General's National Committee to Study the Antitrust Laws* suggests that:

The significance of uniform action may depend, in any one instance, on a variety of factors. How pervasive is the uniformity? Does it extend to price alone or to all other terms and conditions of sale? How nearly identical is the uniformity? How long has the uniformity continued? What is the time lag, if any, between a change by one competitor and that of the other or others? Is the product involved homogeneous or differentiated? In the case of price uniformity, have the defendants raised as well as lowered prices in parallel fashion? Can the conduct, no matter how uniform, be adequately explained by independent business justifications? Upon the answers to questions like these depends the weight to be accorded parallel action in any given case.⁷¹

III.

As we have seen, observance of the rule that the Minnesota act is to be construed in harmony with section 1 of the Sherman Act is of paramount importance in the application of the state law. The significance of the rule invites, indeed requires, an appraisal of its soundness. Is it desirable that the state act be uniformly interpreted in the light of the federal precedents? For a number of reasons I think the answer is yes.

First, it should not be forgotten that antitrust legislation regulates and is imposed upon an extraordinarily complicated pattern of modern commercial activity. Multistate business operations are common, subjecting the entrepreneur to the regulatory jurisdiction not only of the federal government but state governments as well. The practical burdens of compliance with all applicable laws can be serious and expensive. When the policies of the state and federal laws are substantially similar, as here, adherence to a rule of uniform construction makes considerable sense because it avoids wasteful complexity.⁷²

70. *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954). The court said: "Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." *Id.* at 541.

71. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 39 (1955).

72. See Stern, *A Proposed Uniform State Antitrust Law: Text and Commentary on a Draft Statute*, 39 TEXAS L. REV. 717, 718-20 (1961).

Further, it is a real question whether there would be any way of knowing what the Minnesota law is about without reference to federal precedents. Few statutes are couched in more general language, and the state's comparative inactivity in enforcing the act has left it without the judicial gloss it sorely needs. By contrast with the handful of cases under the Minnesota law, one may look to literally hundreds under the Sherman Act. Predictability, so essential to both business and litigation decision-making, dictates reliance on the federal authorities.⁷³

State precedents, when they exist, often raise more problems than they solve. For one thing, most are antiques; a half century of governmental nonenforcement⁷⁴ has assured that. Cases decided during the formative period of antitrust activity often represent outmoded economic and legal thinking, long since discarded. *Duluth Board of Trade*⁷⁵ is a prime example. An agreement to fix a uniform rate of brokerage commissions would not be upheld today, in the face of powerful federal authorities holding price-fixing unlawful per se.⁷⁶ Cases like *Duluth Board of Trade* admirably reveal law in process; an attempt, and a genuinely scholarly one, to find a path in a wilderness of unfamiliar legislation. But 50 years of additional searching have carried antitrust theory a good deal further, and there is no reason for Minnesota law to remain static simply because most of that search has occurred in other jurisdictions.

Moreover, Minnesota's restraint of trade cases often display a disconcerting disregard for the existence of the statute. For example, in *Brainerd Dispatch Newspaper Co. v. County of Crow Wing*,⁷⁷ the plaintiff, a newspaper publisher, obtained agreement from all other newspaper publishing companies in its county that it would submit the only bid to the county board for printing and circulating official county printing. The board was aware of this arrangement but nonetheless accepted plaintiff's bid at the highest legal rate. Later, the board refused to pay plaintiff's bill for

73. "Federal precedents are so numerous, by contrast with state cases, and so convenient to cite that even in matters where the state and federal statutes differ it is common to find the lawyers on both sides and the courts being guided by them." Sieker, *The Role of the States in Antitrust Law Enforcement—Some Views and Observations*, 39 TEXAS L. REV. 873, 878 (1961).

74. See note 6 *supra* and accompanying text.

75. *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N.W. 395 (1909), discussed in notes 26-39 *supra* and accompanying text.

76. See, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

77. 196 Minn. 194, 264 N.W. 779 (1936). See also *Cain v. County of Wabasha*, 164 Minn. 142, 204 N.W. 916, 917 (1925).

work done on the ground that the contract was illegal. A directed verdict for plaintiff was affirmed. The only question raised was whether there was fraud and collusion in submitting the bid. The court held there was no fraud or collusion because the arrangement among the newspapers was open rather than secret. The state antitrust statute was not mentioned or considered.

One is at a loss to know how to interpret this type of decision. It cannot be read as sanctioning bid rigging, one of the most venerable and obvious forms of price fixing.⁷⁸ Yet how this theory could have been overlooked, particularly with the public interest so clearly at stake in a case involving a government contract, is difficult to fathom. Perhaps the statute had simply fallen into such thoroughgoing disuse that everyone had forgotten it. In any event, cases of this sort which ignore antitrust problems and the antitrust statute make far less convincing authority than federal decisions which explicitly face and resolve the issues.

Finally, there are the areas in which reference to a federal rule is needed simply because state authorities, though plentiful, are uninformative. Minnesota boycott cases provide a striking illustration. These are the most numerous, and the least clear antitrust cases decided under the statute. To illustrate this confusion, consider the following fact situations and try to guess how the court came out:

A. Defendants, retail lumber dealers, organized in a voluntary association, formally agree to refuse to deal with lumber manufacturers or wholesalers who sell directly to retail customers at any location at which an agreeing dealer maintains a yard unless the manufacturer or wholesaler will pay the associated dealers a 10 per cent fine on such sales. Any dealer continuing to do business with the offending manufacturer or wholesaler will be expelled from the dealers' association. An offending manufacturer who refuses to pay the 10 per cent sues to prevent the boycott, alleging a potential loss of profits.

B. A produce exchange has bylaws regulating the credit of members, requiring that the purchase of butter and eggs from

78. See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *United States v. Swift & Co.*, 52 F. Supp. 476 (D. Col. 1943); *RESTATEMENT, CONTRACTS* § 517 (1932): "A bargain not to bid at an auction, or any public competition for a sale or contract, having as its primary object to stifle competition, is illegal." Furthermore, the Minnesota Supreme Court has manifested stern disapproval of bid rigging on other occasions. *Regan v. Babcock*, 188 Minn. 192, 247 N.W. 12 (1933); *State ex rel. Barnes v. Tauer*, 178 Minn. 484, 227 N.W. 499 (1929).

nonmembers be at a less favorable price than from members, controlling the delivery time of goods sold, and providing penalties by fine or suspension for certain offenses and defaults. Plaintiff sells in violation of the bylaws and is first fined, then, after refusing to pay, is suspended. He sues the exchange and its members for combining to ruin his business by not selling to or buying from him and influencing others to do the same.

C. Defendant musicians' union has a rule prohibiting members from playing in orchestras of less than a minimum size, not composed solely of union men. A theater owner sues to enjoin enforcement of the rule.

D. Defendant union pickets a theater for the purpose of persuading the owner to stop operating the projection machines himself and hire union labor to do the job. The theater owner sues for damages and an injunction against further picketing.

Does it help to know that two of the foregoing represent lawful combinations and two do not? Those who have played the game may check their answers against the decisions of the court.

Case A is *Bohn Mfg. Co. v. Hollis*,⁷⁹ and its holding is that the lumber dealers' boycott was not actionable. Inexplicably, the court could see no element of coercion or intimidation in the facts, and it did not consider the presence of a conspiracy significant. Any man, it thought, may lawfully refuse to deal with any other, and "the right which one man may exercise singly, many, after consultation, may agree to exercise jointly . . ."⁸⁰

Case B, *Ertz v. Produce Exchange Co.*,⁸¹ distinguished *Bohn* and affirmed an order of the trial court overruling defendants' demurrer. It seemed to the court that the defendants in *Bohn* had a "legitimate interest" to protect while those in *Ertz* did not. The court found the produce exchange was "clearly a combination in restraint of trade, [which] tends to limit or control the market price of articles of produce, and limits and interferes with open and free competition in the purchase and sale of commodities . . ."⁸²

79. 54 Minn. 223, 55 N.W. 1119 (1893).

80. *Id.* at 235, 55 N.W. at 1121. This conclusion appears unsound even at common law, quite apart from the statute. See, *e.g.*, RESTATEMENT, CONTRACTS § 515 Illustration 15 (1932):

A number of wholesale grocers constituting most of those engaged in the trade in a section of the country agree with one another not to buy from manufacturers who sell directly to retail dealers. The purpose is to prevent cutting of prices and to maintain wholesale dealers in their monopoly of acting as middlemen. The agreement is illegal.

81. 82 Minn. 173, 84 N.W. 743 (1901).

82. *Id.* at 178-79, 84 N.W. at 745.

Why these remarks lack applicability to the lumber boycott in *Bohn* is not readily apparent.

In Case C, *Scott-Stafford Opera House Co. v. Minneapolis Musicians Ass'n*,⁸³ the court returned to its position in *Bohn* and held *Ertz* inapplicable. Here the defendants were seen to have a "legitimate" common interest, as they were thought to have had in *Bohn*, and not to have displayed any "malice," as they were thought to have done in *Ertz*. The rule was therefore valid.

Finally, we arrive at Case D, *Rorabach v. Motion Picture Mach. Operators' Union*.⁸⁴ The court rebelled at a rule that would require a theater owner to substitute another for himself as projectionist. *Ertz* and similar cases were deemed in point, since the court felt the union's efforts were aimed at accomplishing an "unlawful purpose." "One man singly, or any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him."⁸⁵ While the court would not reverse the trial court's denial of a temporary injunction, it indicated that the plaintiff would be entitled to relief if his proof bore out his allegations.

Judge Larson recently wrestled manfully with these and other Minnesota boycott cases in *Continental Research, Inc. v. Crutenden, Podesta & Miller*,⁸⁶ and concluded that they "are difficult to reconcile."⁸⁷ An excerpt from his remarks admirably illuminates the problem:

The refusal to deal in the Bohn Mfg. Co. case was no less harmful to the plaintiff than the refusal to deal in *Rorabach v. Motion Pictures Mach. Operators' Union*, and an injunction was authorized against the defendants in the latter case and not in the former. The Court in *Rorabach v. Motion Pictures Mach. Operators' Union* held that the purpose sought by the defendants was an unlawful one, but the plaintiff there had the same choice that the plaintiff in *Bohn Mfg. Co.* had — he could act in the manner that suited him best (and face pressure from the defendants) or he could yield to the will of the defendants and alleviate the pressure upon him. If the plaintiff in *Rorabach* had been compelled to hire more workers than he needed, this was no more than the plaintiff had to do in *Scott-Stafford Opera House Company v. Minneapolis Musicians Ass'n*, where the Court held that it was permissible for the union to strike for the purpose of achieving maximum employment of its members. . . .⁸⁸

83. 118 Minn. 410, 136 N.W. 1092 (1912).

84. 140 Minn. 481, 168 N.W. 766 (1918).

85. *Id.* at 484, 168 N.W. at 766.

86. 222 F. Supp. 190 (D. Minn. 1963).

87. *Id.* at 207.

88. *Ibid.*

One may profitably contrast this confusion with the federal rule that concerted refusals to deal are unlawful per se.⁸⁹ If it is objected that such a per se rule is a blunt instrument for dealing with a subtle economic problem, the Minnesota boycott cases are documentary evidence of the result of an attempt to solve such problems by means of a case-by-case analysis.⁹⁰ Moreover, the federal rule is not merely the product of hasty judicial fiat but the result of careful consideration and rejection of the view that so serious a form of restraint on trade can be economically justified.⁹¹ Not only legal certainty but economic theory will usually benefit when a clear-cut federal rule supplants a muddled string of inconsistent state precedents.

Clearly, therefore, it is desirable that state antitrust law be formulated to harmonize with the precedents under section 1 of the Sherman Act, and the court avowedly intends so to do. The question arises how far this principle should be carried. The answer, it seems, has already been correctly given in the *Campbell*⁹² case, which indicates that federal law is to be followed even at the expense of abandoning prior state precedents.⁹³ Only in this way can the state law, so meagerly and sporadically developed, stay abreast of modern antitrust thinking and yield the predictability of decision so important to both the lawyer and the businessman. State cases should continue to be authoritative only if they are based on federal decisions of continuing validity or if they speak to questions not yet answered under the federal statute.

IV.

To say the present principle underlying application of the state antitrust law is sound, even if some specific applications of it have not been, is not to conclude that the present posture of Minnesota antitrust law is satisfactory. It remains to inquire whether the structure of the state's trade regulation legislation is adequate.

The answer seems apparent; the structure of the state's legislation on trade regulation is not adequate. The existing situation

89. *E.g.*, *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).

90. See the quotation from *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958), in the text accompanying note 55 *supra*.

91. See, *e.g.*, *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).

92. *Campbell v. Motion Picture Operators' Union*, 151 Minn. 220, 186 N.W. 781 (1922). See notes 35, 36 *supra* and text accompanying note 41.

93. For example, *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), would overrule *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N.W. 119 (1893) and supplant it as Minnesota authority.

is almost as unsatisfactory as it could be. The only positive factor is the rule of uniform construction of the state act with section 1 of the Sherman Act. This rule, if faithfully observed, can give the state law discernible meaning it would otherwise lack.

The total impact of the state antitrust law can best be summed up in this hypothetical reply letter from a practitioner to a client who has requested an opinion on how Minnesota antitrust law would effect his business.

1. Although the Minnesota antitrust law has been on the books for approximately three quarters of a century, it has seldom been enforced. Apparently it will be construed to achieve the same results as section 1 of the Sherman Act, but there are several old cases under the state law that are out of harmony with contemporary Sherman Act interpretation. We think the modern Sherman Act precedents should prevail in case of conflict, but we are not entirely certain of such an outcome.
2. Whatever the content of the state law, it may not apply to your interstate transactions. This is a matter of great uncertainty, however. One Minnesota decision points in this direction but the weight of authority elsewhere is to the contrary. Further, there is considerable confusion about what are interstate, as opposed to intrastate, transactions.
3. Assuming that your business is governed by the statute you are probably affected only to the extent that you act in concert with another or others. This means, for example, that you apparently have the right, except as qualified by a variety of special statutes,⁹⁴ to attempt to monopolize your line of commerce in Minnesota as long as you do so individually.
4. Even if you engage in conduct prohibited by the statute, you are probably safe from state prosecution, for the state has not enforced the act for over fifty years.
5. On the other hand, an injured competitor may sue under the statute and may obtain, *inter alia*, forfeiture of your corporate charter.
6. In summary, the content of the statute is somewhat uncertain; the scope of applicability of the statute is most uncertain; the chances that the statute will be invoked against you are small, perhaps even slight; but the possible sanction in the event that you are found in violation of the statute is extremely severe.

A statutory scheme which reduces the practitioner (to say nothing of his befuddled client) to this sort of conjecture is an intolerable mess. Corrective action must be taken.

As a first step, it would be appropriate for the legislature to address itself to the most fundamental of questions — should the state have an antitrust law at all? This is no idle suggestion. "A record of a half century of inactivity creates a strong presumption

94. See, *e.g.*, those statutes described in note 48 *supra*. Of course, if the business practice restrains interstate commerce, § 2 of the Sherman Act applies.

that state antitrust law is neither needed nor desired"⁹⁵

Further, it is possible to advance a number of arguments for repeal, *e.g.*:

(1) The experience and capabilities of the federal judiciary and enforcement agencies, developed during the period of state inactivity, suggests that federal laws are better equipped to achieve the results that are being sought; (2) the private [litigant] does not suffer since a treble damage action usually is available under the federal law no matter how local the restraints; (3) the state can recover for damages to the public under federal law; (4) exclusion of state control would eliminate the problem of double penalties in dual prosecution.⁹⁶

But the rebuttal to these arguments seems more convincing. First, and most important, federal regulation is not all pervasive. Essentially local enterprises such as bowling alleys, barber shops, mortuaries, taxicabs, drive-in theaters, and newspapers have all been held, at one time or another, to lie outside the scope of federal antitrust legislation.⁹⁷ Price-fixing, bid rigging, concerted refusals to deal, and the like can be equally as injurious to competitors and prejudicial to the interests of consumers at the intrastate level as they are at the interstate level where such activities are rigidly prohibited. Any doubts in this regard vanish when one examines the experience of New York, Texas, and Wisconsin, the states which have led the way in vigorous antitrust enforcement. In these states there have been a multitude of successful prosecutions of hard core per se offenses. As of 1963, Wisconsin had a perfect record in suits against antitrust violators.⁹⁸ It seems unlikely that local abuses of the free enterprise system in Minnesota are less numerous or flagrant. The difference is that here they are simply not prosecuted.⁹⁹

95. Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV. 753, 755 (1961). Professor Rahl goes on to say:

The simple fact is that most of the many thousands of Attorneys General and county attorneys in past years, in the inactive states having state laws, have regarded the use of state power against business restraints as so unimportant as to warrant not even one enforcement case in their whole period in office.

Id. at 765.

96. Hanson & von Kalinowski, *The Status of State Antitrust Laws With Federal Analysis*, 15 W. RES. L. REV. 9, 30 (1963); Note, 61 COLUM. L. REV. 1469, 1494 (1961).

97. See Hanson & von Kalinowski, *supra* note 96, at 31; Krotinger, *The "Essentially Local" Doctrine and Section 1 of the Sherman Act*, 15 W. RES. L. REV. 66, 75-76 (1963).

98. Note, 38 N.Y.U.L. REV. 575, 583 n.58 (1963).

99. Some reasons why the need for state antitrust enforcement is likely to grow are advanced in Sieker, *supra* note 73, at 874-75.

Moreover, federal enforcement is not entirely adequate even within the clearly assignable sphere of federal jurisdiction. Neither the Justice Department nor the Federal Trade Commission has the manpower or resources to proceed against every conceivable antitrust infringement affecting interstate commerce. They must give priority to practices burdening multistate markets; they need and desire state enforcement activity as a supplement and complement to their own programs.¹⁰⁰ "Vigorous state antitrust law enforcement thus appears necessary to insure the protection of the local market places of the states."¹⁰¹ "It is clear that the federal law as we now know it is not equal to the task alone."¹⁰²

While these conclusions seem correct, the legislature need not accept on faith this or any other view on so important a question. It could and should authorize and direct the state Attorney General to appoint a committee, composed of interested and knowledgeable representatives of government and the teaching and practicing bar, to study the problem and recommend solutions. Lest it be thought that such an antitrust study committee would be forced to operate in a vacuum, it is worth noting that a great deal of careful thought has recently been devoted to state antitrust legislation. Several quiescent states have determined to put some muscle into their trade regulation programs, and several others have undertaken to adopt their first statutes.¹⁰³

100. *Id.* at 873-74; Rahl, *supra* note 95, at 759-60; Stern, *supra* note 72, at 717-18; Note, 61 COLUM. L. REV. 1469, 1472-73, 1495 (1961).

The interest of the Federal Trade Commission has become so great that it has established an "Office of Federal-State Cooperation" to develop programs of effective cooperation between the F.T.C. and state agencies responsible for enforcing state antitrust laws. United States Senator Harrison A. Williams, Chairman of the Subcommittee on Frauds and Misrepresentation Affecting the Elderly of the Senate Special Committee on the Aging, immediately expressed his approval of this step to encourage more effective state action. F.T.C. News Summary No. 8 Wash. D. C. 20580, April 13, 1965.

101. Stern, *supra* note 72, at 718.

102. Rahl, *supra* note 95, at 711.

It is clear the Congress contemplated a federal-state partnership in anti-trust enforcement. See H.R. REP. NO. 1707, 51st Cong., 1st Sess. (1890). Senator John Sherman, for whom the first federal antitrust act was named, believed that the object of federal legislation was "to supplement the enforcement of the established rules of the common and statute law by the courts of the several states." 21 CONG. REC. 2457 (1890).

103. See COLO. REV. STAT. ANN. §§ 55-4-1 through 4-6 (1963); HAWAII REV. LAWS § 205 (Supp. 1963); WASH. REV. CODE § 19.86.010-.920 (Supp. 1963). The Attorney General of Illinois is campaigning vigorously for a new antitrust statute in the state. See BNA, ANTITRUST REG. REP. No. 206, p. A-12 (1965). The recent revival of state antitrust activity is summarized in Note, 38 N.Y.U.L. REV. 575-76 (1963). This revival merely furthers restoration of

Perhaps even more important is the current movement for a uniform state antitrust law to provide practical and coherent implementation for state antitrust policy with a minimum of friction with the federal agencies. A first tentative draft of such a statute has been submitted to the National Conference of Commissioners on Uniform State Laws.¹⁰⁴ Basically, it follows the federal antitrust laws but with modifications designed to focus enforcement on localized restraints. Only the most common local restraints—price-fixing among competitors, allocation of customers and markets among competitors, collusive bidding, and concerted refusals to deal—are specifically prohibited. Other federal provisions, notably those dealing with mergers, are omitted.

It has been suggested that such an omission is unfortunate,¹⁰⁵ and at least one commentator has blocked out a model statute that encompasses most of the restraints covered by federal legislation.¹⁰⁶ There is much to be said, however, for a more conservative approach. Anyone familiar with the tremendously complex problems confronted in the course of litigation under the Clayton and Robinson-Patman Acts must pause at the thought of burdening a lightly staffed and relatively inexperienced state antitrust office with the task of enforcing copies of these statutes.¹⁰⁷ In all probability there will be more than enough for such an office to do, and much good for it to accomplish, in the prosecution of such patently anticompetitive behavior as price-fixing and the boycott.¹⁰⁸

the federal-state balance. "In their earliest beginnings, the antitrust statutes were of state rather than federal origin." Wilson, *The State Antitrust Laws*, 47 A.B.A.J. 160 (1961). "Before the Sherman Act was passed, fourteen states and territories had constitutional prohibitions against monopolies: . . . Even more significantly, thirteen states had such *statutory* prohibitions . . ." Unpublished paper of Minnesota Special Assistant Attorney General David Lebedoff, which Mr. Lebedoff kindly made available to the author, a copy of which is on file at the University of Minnesota Law Library.

104. See 5 TRADE REG. REP. ¶ 50,199 (August 28, 1963).

105. Arnold & Ford, *Uniform State Antitrust Act: Toward Creation of a National Antitrust Policy*, 15 W. RES. L. REV. 102, 109 (1963).

106. See Stern, *supra* note 72.

107. In this respect, Minnesota may already have too much law, rather than too little, in its obscure copy of that most obscure statute, the Robinson-Patman Act. See MINN. STAT. § 325.03 (1961).

108.

To be effective, a state law undoubtedly should have the following qualities. It must be broad enough substantively to reach all of the serious and common restraints of trade. It should clearly cover the two most common of all types—price fixing and allocation of

In any event, there is ample material to support a meaningful state antitrust study, and the need for such a study in Minnesota is clear. Meanwhile, the legislature could take a giant stride toward remedying the present situation within the framework of existing law:

The most important suggestion may be made at the outset very quickly. It is that for most states which now have a law, however antique it may be, a resolution of the legislature directing the Attorney General to enforce it and appropriating some money for that purpose would mean more than a carload of new substantive provisions. For the basic deficiency now is not lack of an ideal statute, but lack of a decision as to whether the state really wants any antitrust law at all.¹⁰⁹

One may go further and suggest that the state probably will be in a better position to assess the adequacy of its present antitrust law, as well as the desirability of having any antitrust law, if it has had an opportunity to observe the consequences of enforcing existing legislation. In addition, active enforcement would remedy the present tendency of the law to disadvantage the honest businessman, *i.e.*, the businessman who refrains from a course of conduct which he knows is against the law while his less ethical competitor freely engages in such conduct knowing

markets. . . .

Experience also suggests that there are certain things which a state law should not do. State law in most instances will be starting from scratch, confronted by a dismal half-century record of inactivity and failure. Accordingly, caution and self-restraint are in order. The substantive law should not be smothered with unrealistic expectations. It would be better to be content with prosecution of relatively simple cases of clearly wrong behavior, especially price fixing and market allocation, thereby embracing reasonable goals, than to seek experimentally to fashion an ideal economic world and thereby accomplish nothing. The state law should be slow to take on complex economic problems associated with market structure, mergers, oligopoly and related problems, which are better left to federal policy. It should avoid blowing itself out on "big" cases. And it should not tread too quickly upon ground which is controversial among serious antitrust adherents.

Rahl, *supra* note 95, at 771-72. See Hanson & von Kalinowski, *supra* note 96, at 32-33.

A draft bill introduced in the 1965 session of the legislature would have reached both monopolization and acquisitions. See H.F. No. 1631, April 1965. The bill was not reported out of committee.

109. Rahl, *supra* note 95, at 755; accord, Hanson & von Kalinowski, *supra* note 96, at 31-32; Note, 38 N.Y.U.L. REV. 575, 590 (1963).

In the unpublished paper cited *supra* note 103, Minnesota Special Assistant Attorney General Lebedoff points out that California has six full-time antitrust attorneys, New York has more than a dozen, and Texas recently had thirty men working on a single antitrust case. By contrast, the Minnesota antitrust unit consists of two attorneys and a part-time investigator. Even this limited staff was not organized until 1961.

he is not likely to be caught. Enforcement would also relieve the practitioner of the uncomfortable moral problem of drawing a distinction for his client between what is lawful and what is safe.¹¹⁰

The fact remains that one substantive problem, in particular, cries out for immediate attention. This is the present statutory provision requiring charter forfeiture or loss of the right to do business in Minnesota whenever a corporation is found to have violated the antitrust law, even in a suit brought by a private party.¹¹¹ It is a truism that unrealistic penalties are not enforced. It is difficult to imagine anything better calculated to dampen the ardor of an Attorney General than the knowledge that success in an ordinary, run-of-the-mill antitrust case is certain to lead to so severe a punishment. Similarly, one sympathizes with the judge who searches for a way — any way — to find for the defendant and avoid such a result. Only the strike-suit plaintiff will take comfort in this sanction. Responsible proposals uniformly urge that charter forfeiture be left to the discretion of the court,¹¹² and it is doubtful that any progress can be made in Minnesota antitrust enforcement until the statute is thus amended.¹¹³ Even if a study committee were to accomplish no more than this, it would have more than justified its establishment.

V.

Present Minnesota trade regulation law has all the virtues of a drifting derelict; it is a dangerous hazard to many wayfarer on the lanes of commerce and an object of utility to virtually none. There is a need for a fundamental reexamination of both the substance and the enforcement machinery of the state's antitrust policy. Appointment of a Minnesota antitrust study committee would pave the way for achievement of important basic reforms.

110.

When asked about a proposed price-fixing scheme, a California attorney wrote to the president of the company concerned as follows: "As general counsel for the company, I conclude that the proposed plan is illegal. In my role as a member of the Board of Directors, however, I feel there is very little chance it will be discovered."

Note, 38 N.Y.U.L. Rev. 575 (1963).

111. See *Miller v. Minneapolis Underwriters Ass'n, Inc.*, 226 Minn. 367, 33 N.W.2d 48 (1948), discussed in notes 19-22 *supra* and accompanying text.

112. See *Hanson & von Kalinowski*, *supra* note 96, at 33; *Rahl*, *supra* note 95, at 781; H.F. 1631, introduced into the 1965 session of the Minnesota legislature but not reported out of committee, would have effected such a change. However, it would also have wrought sweeping modifications of existing law (*e.g.*, to encompass monopolization and mergers) that seem better left to await thorough study; see *Stern*, *supra* note 72, at 745.

113. The Wisconsin statute was so amended in 1949. WIS. STAT. § 133.245 (1965); see Note, 1951 WIS. L. REV. 657, 662.

